Senate Commerce Committee
Hearing on the Proposed National Tobacco Litigation Settlement
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STATEMENT OF KRIS W. KOBACH

Assoc. Professor of Law
University of Missouri—Kansas City School of Law

"The Unconstitutionality of a Congressionally-Imposed Limit on Attorneys' Fees in the National Tobacco Settlement"

Introduction

Mr. Chairman and members of the Committee, I am Kris Kobach, a Professor of Constitutional Law at the University of Missouri—Kansas City School of Law. I want to take this opportunity to thank you for inviting me to speak on the issue of the constitutionality of congressional limitation of the fees of private attorneys representing the various states involved in this litigation. My comments today will summarize the research and conclusions that I have set forth in a longer article on the subject in the *South Carolina Law Review*. I have submitted the article for your consideration and for the record of this Committee.

I have been asked if the congressional imposition of an attorneys' fee cap governing the fees paid by states to their private attorneys, or a regulatory mechanism to set and limit those fees, would survive constitutional scrutiny. I will be direct and unequivocal in my response. Such congressional interference with the contracts negotiated by the states and their attorneys would be unconstitutional and would likely be struck down upon judicial review.

There are two constitutional barriers prohibiting such action by the federal government. First, it would violate the state sovereignty protected by the Tenth Amendment. Second, it would constitute an uncompensated taking of private property in contravention of the Fifth Amendment. I will briefly explain each of these constitutional

impediments, turning first to the Tenth Amendment.

The Tenth Amendment

As the Committee is no doubt aware, the U.S. Supreme Court has, in recent year, demonstrated that it takes the Tenth Amendment and the broader concept of state sovereignty very seriously. Two decisions were particularly salient in this regard. In 1992, in the case of *New York v. United States*, the Court used the Tenth Amendment to strike down the "take title" provisions of the Low-Level Radioactive Waste Policy Amendments Act of 1985. And just last year, in the case of *Printz v. United States*, the Court struck down the background check provisions of the Brady Act. At the heart of these two decisions was a simple, but powerful, principle: *the decisions and regulations of state governments are not subject to congressional command.*

In the *New York* decision, the Court held that it was impermissible for Congress to compel state legislatures to either adopt a federal regulatory scheme for the disposal of radioactive waste or assume liability for the waste. And in *Printz*, the federal government violated the Tenth Amendment by commandeering state and local law enforcement officers to peform background checks. In both cases, the federal government attempted to regulate the states, *as states*, in a way that violated their decision-making autonomy.

Similarly, any congressional effort to sweep aside the tobacco litigation attorney's fees negotiated by the states and their attorneys, and replace them with a lower fee amount would transgress the states' decision-making autonomy. It would negate the existing fee arrangements, and effectively say to the states, "You may not contract for legal representation at the rates that you negotiated. Instead, you must adhere to a different fee level approved by Congress." This would intrude upon the states' authority to seek legal representation at the contingency rates they choose. Just as Congress may not tell the states that they are paying their governors too much or spending too much money on school teachers, Congress may not tell the states that they are spending too much money on legal representation. The Tenth Amendment protects the autonomous decision-making of the states in each of these areas.

In *Printz*, the Court placed particular emphasis on the privity of obligation between

a state government and its citizens. In other words, there are obligations that a state government owes it citizens. And the federal government may not interfere with these obligations. When the states launched their suits against the tobacco industry, they owed an obligation to their citizens to select a contingency fee that properly balanced the probability of success in recovering Medicaid expenditures against the substantial risks borne by private attorneys who invested millions of dollars and lawyer hours in the litigation. The federal government has no constitutional authority to play Tuesday morning quarterback and second-guess the states by declaring that the states negotiated a bad deal for their citizens. Such interference would intrude upon this privity of obligation.

The Framers constructed a constitutional framework in which state officials would be responsible to their constituents for state-level decision and federal officials would be responsible to their constitutents for federal decisions. They specifically rejected a system under which Congress could direct the states to make legislate according to Congress's wishes. It is with this founding principle in mind that the Court has carved out a protected zone of state decision-making autonomy.

The Fifth Amendment

The second constitutional barrier to congressionally-imposed fee cap is the Takings Clause of the Fifth Amendment. The federal negation of the contingency arrangements between the states and their private attorneys would amount to a taking of private property from the attorneys without the payment of just compensation.

Back in 1934, in the decision of *Lynch v. United States*, the Court reiterated the already well-established principle that the Takings Clause protected more than just real estate, it also protected contract rights. In the words of Justice Brandeis: "The Fifth Amendment commands that property be not taken without making just compensation. Valid contracts are property, whether the obligor be a private individual, a municipality, a State or the United States."

The attorneys possess the requisite "investment-backed expectation" that is necessary to establish a contractual property interest protected by the Takings Clause.

They have valid, binding contracts for legal services that entitle them to a stipulated percentage of their state's share of recovered Medicaid expenditures. In reliance on these contracts they have invested massive amounts of their resources (resources that state attorneys general could not afford to devote to this litigation). And they did so with what at the time appeared to be little hope of success. A contractual property right vests for Fifth Amendment purposes when the contract is made and consideration is given, even if the right does not fully mature until the occurrence of some future event.

By negating the fee arrangements between the states and their attorneys and replacing them with lower fees or with some other mechanism to set the fees, the federal government essentially would be seizing the attorneys' contractual property and transferring that property to the states. The federal government has the constitutional authority to do this, but if it does so, the Fifth Amendment requires that federal government pay the attorneys just compensation—which is the value of the contractual property taken from them.

On three occasions in the Twentieth Century, the Court has been presented with a case like this one in which the federal government took action that had the direct effect of negating a private party's contractual right (as opposed to incidentally devaluing a contract right through regulatory action). In each instance, the Court found that a violation of the Fifth Amendment had occurred.

Allow me to draw your attention to one of these cases in particular, one that closely parallels the action under consideration today. In its 1935 *Louisville Joint Stock Land Bank v. Radford* decision, the Court heard a takings challenge to the Frazier-Lemke Act of 1934. As you may know, that Act provided relief to bankrupt farmers by amending the country's bankruptcy laws. However, the Act had the effect of nullifying various contractual rights held by banks in their mortgage contracts with farmers. A bank challenged the Act under the Takings Clause and the Court agreed that a taking had occurred. The Act took from the banks specific valuable contractual rights in the name of benefitting farmers without providing any compensation. In the same way, a congressionally-imposed fee cap would take from the attorneys specific valuable contractual rights in the name of benefitting state coffers without providing any compensation. No matter how weighty the public interest may be, when the federal

government alters specific, identifiable contractual rights so as to relieve one class of parties and deprive another class, it commits a compensable taking.

Conclusion

In conclusion, let me stress that any congressional attempt to alter the contingency fee arrangement between states and their counsel will face formidable constitutional hurdles and will, in all likelihood, be struck down in court. Such congressional action would trench upon a core principle of state autonomy protected by the Tenth Amendment, and it would constitute a uncompensated confiscatory taking of contractual property in violation of the Fifth Amendment. Either of these constitutional provisions is sufficient on its own to invalidate the congressional limitation of these attorneys' fees.